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No. 88-598

In The

Supreme Court of the United States

October Term, 1988

GEORGE RAKOVICH,

Petitioner,

v.

GREGORY WADE, DARRYL DRAKE, and CHESTER KASS,

Respondents.

OBJECTION TO JURISDICTION AND BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether this Court has jurisdiction since petitioner filed his petition 122 days after the Seventh Circuit *en banc* decision?

2. Whether this Court should review the evidence and determine whether petitioner proved retaliatory motive after the Seventh Circuit *en banc* already did so and answered "No"?

3. Whether this Court should review this police officer qualified immunity holding by the Seventh Circuit en banc 9-2 decision applying the standards set forth in the *Harlow* and *Anderson* cases when the Seventh Circuit separately determined that retaliatory motive was not demonstrated and held that the respondents' motion for a directed verdict should have been granted on both grounds?

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OBJECTION TO JURISDICTION

A. The Petition For Writ Of Certiorari Was Not Filed Within 90 Days Of The Court of Appeals En Banc Decision.

Petitioner erroneously cites 28 U.S.C. 1257(3) to invoke jurisdiction of this Court. Respondents assume that the petitioner is attempting to invoke this Court's jurisdiction pursuant to 28 U.S.C. 1254(1).

However, jurisdiction still does not lie. Pursuant to 28 U.S.C. 2101(c) the writ of certiorari must "be taken or applied for within 90 days after the entry of such judgment or decree". In this case, the Court of Appeals *en banc* opinion and judgment was decided June 8, 1988. The Petition for Writ of Certiorari was filed 122 days later, or October 8, 1988. The petition is clearly untimely.

B. Petitioner's Petition For A Second Rehearing En Banc Is Not Authorized By The Rules And Cannot Operate To Toll The 90 Day Filing Requirement.

Petitioner alleges jurisdiction since the petiton was filed within 90 days of the Court of Appeals denial of petitioner's request for a second rehearing of the *en banc* rehearing. The Federal Rules of Appellate Procedure make no provision for a rehearing of a rehearing. See F.R.A.P., Rule 40. Indeed, the Seventh Circuit in denying petitioner's petition for rehearing, states that, ". . . there is no provision in the rules authorizing a series of rehearing petitions with suggestion for rehearing *en banc*. . . ." See APPENDICES TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, App. D. p. 2.

Practical considerations also militate against allowing a series of petitions for rehearing. Pursuant to Supreme Court Rule 20.4, when a timely petition for rehearing is filed the 90 day requirement of 28 U.S.C. 2101(c) is tolled and does not begin to run until denial of the rehearing (or subsequent judgment entered on the rehearing). If a series of petitions for rehearing were to be allowed, a party could, theoretically at least, indefinitely extend the time for filing a writ of certiorari by continuously filing timely petitions for rehearing.

This Court should apply the principle it has often cited to petitioners—"the principle that litigation must at some definite point be brought to an end". *Federal Trade Commission v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 213 (1952). A petition for rehearing of a rehearing undermines this principle and interjects uncertainty into an otherwise final judgment. Petitioner's petition for a second rehearing should not be treated as tolling the 90 day requirement of 28 U.S.C. 2101(c).

C. Petitioner's Petition For A Second Rehearing Was Not Considered On The Merits By The Seventh Circuit And The Order Denying Petitioner's Petition For Rehearing Did Not Constitute A Subsequent Judgment Under S.C.R. 20.4.

Petitioner recites in his jurisdictional statement that his petition is filed within 90 days of the Seventh Circuit's denial "after consideration" of petitioner's petition for a second re-hearing *en banc*. While it is true that the Court of Appeals did "consider" the petition and deny it, a recital that the petition was "considered" is not the equivalent of a review of the petition on its merits and did

not constitute a subsequent judgment under S. C. R. 20.4. The final judgment petitioner seeks this Court to review was rendered on June 8, 1988.

It is apparent that the Court of Appeals did not undertake a review of the merits in denying petitioner's petition for rehearing. The *en banc* decision split 9 to 2 in favor of the respondents. However, the Court unanimously voted to deny petitioner's petition for rehearing. If the Court of Appeals had considered petitioner's petition for rehearing on the merits, its decision denying the same would not have been unanimous, but would have followed the same 9 to 2 split. Therefore, it is clear that the Court of Appeals did not reach the merits in ruling on petitioner's petition, but instead, simply determined that the petition did not set forth new grounds or facts sufficient to reopen the matter.

The *en banc* opinion of the Seventh Circuit was entered June 8, 1988. The Seventh Circuit denied petitioner's petition for a second rehearing on July 14, 1988, so petitioner still had 54 days to timely file his petition. (or by September 6, 1988)

STATEMENT OF THE CASE

A. Nature Of The Case

Claiming that the investigation, charging conference, and attendant publicity were improperly motivated and had caused an injury of constitutional dimentions, petitioner, on March 3, 1982, commenced a section 1983 action

against respondent, Police Officer Gregory Wade, respondent, Police Officer Darryl Drake, City of Greenfield Police Officer Mary Foley and City of Greenfield. On April 18, 1983, petitioner filed a separate but similar suit naming respondent Chief of Police Chester Kass and City of Greenfield Mayor Francis Havey as defendants. The actions were consolidated. The City of Greenfield was dismissed from the action by order of the district court. Foley was dismissed by stipulation. Respondents and Havey moved for a directed verdict at the close of all the evidence on the ground of insufficiency of evidence and qualified immunity. The district court granted the motion as to Havey and took the motion under advisement as to the respondents.

Petitioner erroneously represents to this Court that the jury made various findings. The jury reached a general verdict against respondents; there were no special verdict questions.

The Seventh Circuit on rehearing *en banc* conducted a *de novo* review of petitioner's retaliation claim, and carefully reviewed the nearly 1,300 pages of transcripts and several hundred pages of the record. App. A, p. 13, 20. This exhaustive review of the record was conducted within the *Mt. Healthy City School District v. Doyle*, 429 U.S. 294 (1977), mixed motive framework. The Seventh Circuit, in a 9 to 2 decision, held that no reasonable juror could have found that retaliation motivated the respondents. The Seventh Circuit founded its decision not only on a factual determination that retaliatory motive was not demonstrated but also held that the respondent officers clearly are qualifiedly immune. The Seventh Circuit re-

versed the district court's denial of the respondent officers' motion for directed verdict.

B. Statement Of Facts

The Seventh Circuit decision contains an excellent review and analysis of the facts. Certain of the facts, however, need to be highlighted, because of inaccuracies in petitioner's petition. Petitioner contends that he was the object of an investigation because of the exercise of his First Amendment rights. As noted in the Seventh Circuit decision, it was undisputed that the initiation of the investigation was proper and that respondents did not know that petitioner was the individual contacting the state's witness until late in the investigation. At that point, the investigation was continued pursuant to the direction of the first assistant district attorney. Respondents did not record petitioner's conversations. Respondents did not request that petitioner be summoned before the district attorney to be charged with violations of Wisconsin criminal law. The first assistant district attorney made an independent determination to order petitioner in for a charging conference. Respondents did not disclose to the media that petitioner was the object of a criminal investigation. Rather, respondents released to the media that petitioner had been called by the district attorney to a charging conference as they were authorized to do by the assistant district attorney.

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ARGUMENT

I. PURSUANT TO THE DECISIONS OF THIS COURT AND S.C.R. 17, THIS COURT WILL NOT GRANT CERTIORARI TO REVIEW EVIDENCE AND DISCUSS SPECIFIC FACTS.

The facts are dispositive of this case. The Seventh Circuit *en banc* conducted a *de novo* review of petitioner's retaliation claim. It carefully reviewed the nearly 1,300 pages of transcripts and the several hundred pages of the record and made a factual determination that retaliatory motive was not demonstrated. The Seventh Circuit stated, "that if the evidence were viewed otherwise, they would be accepting the veneer of retaliation molded out of accumulated general and stale evidence that in no way was directly tied into the alleged deprivations." App. A, pp. 32-33. It stated also, "the evidence shows that only speculation or exaggeration could link each category of evidence to the claimed injury." App. A, p. 33. The Seventh Circuit held that is not the type of evidence that a jury should be asked to weigh and, that respondents' motion for judgment notwithstanding the verdict should have been granted.

The review of evidence or inferences drawn therefrom is not one of the special and important reasons governing review on certiorari contained in S.C.R. 17. This Court will not grant certiorari merely to review evidence or inferences drawn therefrom. *N.L.R.B. v. Pittsburgh SS Co.*, 340 U.S. 498 (1951); *United States v. Johnston*, 268 U.S. 220 (1925).

II. THE SEVENTH CIRCUIT'S QUALIFIED IMMUNITY RULING DOES NOT REQUIRE A CASE "ON ALL FOURS" AND DOES NOT CONFLICT WITH DECISIONS OF THIS COURT.

Petitioner contends that the Seventh Circuit decision requires a case directly on point as a condition precedent for finding a violation of clearly settled law. The Seventh Circuit decision unequivocally states that neither cases involving the exact fact pattern at bar nor binding precedent is necessary to show a clearly established right. App. A, pp. 56-57. The Seventh Circuit cited the requirements established by this court in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) and *Anderson v. Creighton*, 107 S.Ct. 3034 (1987) and then applied those requirements to the facts in this case.

III. THE ALLEGED QUALIFIED IMMUNITY CONFLICT IN THE CIRCUITS IS ILLUSORY BECAUSE THE THREE CASES CITED BY PETITIONER WERE DECIDED PRIOR TO THIS COURT'S DECISION IN ANDERSON.

This Court articulated a uniform standard for the application of the clearly established law requirement in *Anderson*. The three cases relied upon by petitioner as allegedly conflicting were decided before this Court decided *Anderson*. Thus, the alleged conflict in the circuits is illusory.

IV. THE SEVENTH CIRCUIT'S MOUNT HEALTHY RULING DOES NOT CONFLICT WITH A DECISION OF THIS COURT.

Petitioner's Argument V is a two pronged argument. The first prong is that the Seventh Circuit applied a too

onerous burden on petitioner under the *Mt. Healthy City School District v. Doyle*, 429 U.S. 294 (1977), substantial factor burden of persuasion. The second prong is that the Seventh Circuit misunderstood the second part of the *Mt. Healthy* mixed motive test. Petitioner posits that the second part of the test is a damages rule, not a constitutional rule. An examination of petitioner's argument and the Seventh Circuit decision show that the alleged conflict is totally petitioner's creation and does not exist.

A. Whether Or Not The Seventh Circuit Applied A "But For" Test Is Irrelevant Because The Seventh Circuit Found A Complete Insufficiency Of Proof.

The Seventh Circuit conducted a *de novo* review of petitioner's retaliation claim. Whether the Seventh Circuit applied a too onerous burden on petitioner under the *Mt. Healthy* substantial factor test is irrelevant because the Seventh Circuit found nothing in the record to suggest that the respondents were motivated by an improper purpose. The Seventh Circuit found that no reasonable juror could find that retaliation motivated the respondents. It held that respondents' motion for a directed verdict should have been granted based on insufficiency of the evidence.[1]

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[1]The Seventh Circuit stated that even if it manipulated the parties' cases to comport with the allocation directed by *Mt. Healthy* and also assume that petitioner carried his burden of persuasion, the record demonstrated that the respondents would have acted in the same fashion even in the absence of the constitutionally protected activities of petitioner. See App. A, p. 35, n. 12.

B. The Seventh Circuit Did Not Convert The Substantial Factor Test Into A "But For" Test Because The Seventh Circuit Considered But Did Not Rely On The Decision Of Which Petitioner Complains.

Although petitioner does not cite the specific case which he claims converts the substantial factor test into a "but for" test, *Button v. Harden*, 814 F.2d 382 (7th Cir. 1987) is apparently the case of which petitioner complains. The Seventh Circuit used three of its decisions to guide its determination of the type of evidence that suffices to meet the "motivated" or "substantial" burden in a directed verdict or judgment notwithstanding the verdict context. *Button* was not one of those cases. Although the Seventh Circuit may have considered *Button* it did not rely upon it. A review of the cases relied upon by the Seventh Circuit and of its analysis show that the substantial factor rule was not converted into a "but for" rule.

C. The Seventh Circuit Correctly Applied The Second Part Of The Mt. Healthy Test.

Petitioner contends that the "but for" causation of *Mt. Healthy* applies only to remedy. Petitioner argues that once a plaintiff has carried his *Mt. Healthy* burden of persuasion that he has established a constitutional injury. Petitioner argues further that if defendants then prove their *Mt. Healthy* burden that plaintiff cannot recover compensatory damages but the possibility exists that plaintiff could recover nominal damages, attorney's fees and, where appropriate, punitive damages.

Petitioner's argument is irrelevant. As previously shown, petitioner did not produce any evidence showing

that respondents were motivated by retaliation. Thus, petitioner never even approached proving his burden of persuasion.

A defendant will prevail in a Section 1983 action on the basis of lack of causation when the plaintiff fails to prove the defendant's unconstitutional conduct was a substantial factor in producing the plaintiff's injury or when the defendant establishes that the same injury would have occurred in the absence of the conduct. The plaintiff will prevail only when there is a finding that the defendant's conduct was the "but for" cause of the plaintiff's constitutional injury. *Mt. Healthy,* 429 U.S. at 285-287; *Givhan v. Western Line Consolidated School District,* 439 U.S. 410, 417. See also Eaton, *Constitutional Torts,* 67 Iowa L.R. 443, 452-454 (1982).

It is clear from the decisions of this Court that the second part of the *Mt. Healthy* test is not merely a damage rule. Thus, the decision of the Seventh Circuit does not conflict with decisions of this Court.

V. THE SEVENTH CIRCUIT'S MT. HEALTHY RULING DOES NOT AFFECT IMPORTANT INTERESTS THAT NEED TO BE ADDRESSED BY THIS COURT BECAUSE THIS COURT HAS SET FORTH CLEAR GUIDELINES ON HOW TO ANALYZE MIXED MOTIVE CASES AND THE SEVENTH CIRCUIT'S RULING FOLLOWS THOSE GUIDELINES.

Petitioner urges this Court to grant certiorari to clarify *Mt. Healthy* because of the large number of cases that arise in an employment discharge setting. The instant case is not an employment discharge case. Respon-

dents respectfully submit that, if clarification of the law is needed in employment discharge cases, the Court would be better served to wait for a case actually in the employment discharge setting.

Petitioner maintains that there is a conflict in the circuits regarding the second part of the *Mt. Healthy* mixed motive test. Petitioner cites a Ninth Circuit case that is in accord with the Seventh Circuit decision. Petitioner, however, fails to cite any circuits in conflict with the Seventh and Ninth Circuit. The only "authority" petitioner cites in support of his argument is his attorney. Thus, there are no important interests which merit the Court granting certiorari.

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CONCLUSION

The petition for writ of certiorari should be denied because:

1. The Court lacks jurisdiction because the petition was not timely filed;

2. The Seventh Circuit exhaustively reviewed the record in this case and found as a matter of law that respondent police officers' motion for directed verdict should have been granted because petitioner failed to prove retaliatory motive.

3. This court will not grant certiorari merely to review evidence.

4. The Seventh Circuit correctly applied the *Mt. Healthy* and *Harlow-Anderson* tests to the facts of this case.

Respectfully submitted,

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